KIMOYAMA ELEKTRIK (M) SDN. BHD.

v.

METROBILT CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D4-28-562-89]
12 JUNE 1990

COMPANY LAW: *Winding-up - Payment by company to a creditor - Whether undue preference - Petition for winding-up pending - Whether void - Validating order - Discretion of Court - Interests of creditors - Sections 223, 293 Companies Act 1965.*

The petitioner, K is seeking the winding-up of the respondent M on the ground that M is unable to pay its debts. Three other creditors of M oppose the petition. Another creditor F, had given notice of its intention to support the petition; however at the hearing, F's Counsel advised the Court that F was no longer supporting the petition. It was alleged that a sum of RM50,000 had been paid by M to F and that M had transferred property to F in settlement of M's debt to F. K's Counsel alleged that this was undue preference of one creditor over another and was therefore contrary to ss. 223 and 293 of the Companies Act 1965 (the Act) and was void unless M applied to the Court for a validating order. M's Counsel submitted that s. 223 of the Act refers to disposition of property after the company had been wound up.

Held:

[1] From the case law it is clear that, under s. 223 of the Act, the disposition of the property of M after a winding-up petition has been presented is void unless the Court makes a validating order. The purpose of the section is to protect the interests of creditors when a petition for winding-up is presented.

[2] Although the Court has a discretion whether or not to make a validating order, the Court will not do so if the result of the order is to make one or more creditors being paid in full.

[Dispositions of money and property to F were void. Order for money and property to be returned by F to M.]

Cases referred to:

Re Miles Aircraft Ltd. [1948] 1 Ch 188
Re A.1. Levy (Holdings) Ltd. [1964] 1 Ch 19
Wiltshire Iron Company [1868] 3 Ch App 443
Re Clifton Place Garage Ltd. [1970] 1 Ch 477
Re Gray's Inn Construction Co. Ltd. [1980] 1 All ER 814
Commonwealth Industrial Gases Ltd. v. Dorcon Constructions Pty. Ltd. 14 ACLR 201
Lian Keow Sdn. Bhd. & Ors. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449
Datin Hajjah Zaleha & Ors. v. Perkasa Trading Sdn. Bhd. & Anor. [1948] 1 MLJ 372

Legislation referred to:

Companies Act 1963 [NT] [Aust], s. 227
Companies Act 1862 [UK], s. 153
Companies Act 1965, ss. 223, 293
Companies Act 1948 [UK], s. 227

For the petitioner - Gurubachan Singh; M/s. Nashir, Johal & Co.
For the respondent - K.Y. Leong; M/s. S. Sothi, Leong & Partners

JUDGMENT

Zakaria Yatim J:

In this petition the petitioner, Kimoyama Elektrik (M) Sdn. Bhd. is seeking the order of the Court to wind-up the respondent company, Metrobilt Construction Sdn. Bhd. (hereinafter referred to as 'the company') on the ground that the company is unable to pay its debts.

There are other creditors of the company who attended the hearing of the petition. Three of the creditors, *viz*., Miliweb (M) Sdn. Bhd., Arab-Malaysian Merchant Bank Berhad and Syarikat Pembinaan Low Eng Moh Sdn. Bhd. are opposing the petition. One other creditor, Fullmark (M) Sdn. Bhd., (Fullmark) was also present at the hearing. Fullmark has given notice of its intention to support the petition.

At the commencement of the hearing of the petition, Mr. C.K. Tan, Counsel for Fullmark told the Court that Fullmark was withdrawing itself as a supporting creditor in the petition. Mr. Gurubachan Singh, Counsel for the petitioner objected to Fullmark withdrawing itself from supporting the petition. He said that a sum of RM50,000 had been paid by the company to Fullmark in settlement of the debt. He added that the company had also transferred a piece of property to Fullmark in addition to the amount paid. He submitted that this was an undue preference of one creditor over another after the petition had been presented and therefore contrary to ss. 223 and 293 of the Companies Act 1965.

Mr. C.K. Tan confirmed that a sum of RM50,000 was paid to him as stakeholder. According to him he was to hold the money pending the outcome of the hearing of the petition. He added that the money was paid by the parent company in Singapore, which was a third party and a different entity altogether. Mr. K.Y. Leong, Counsel for Syarikat Pembinaan Low Eng Moh told the Court that the money was paid by the company itself.

It is now necessary to consider whether it was proper for the company to settle its debt with one creditor while a petition for winding up is pending before the Court. Section 223 of the Companies Act states:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Encik Mohd. Ismail, Counsel for the company submitted that s. 223 refers to disposition of property after the company had been wound-up. In support of his submission, he cited *Re Miles Aircraft Ltd.* [1948] 1 Ch 188. In that case, the applicants, who held an equitable charge on the assets of the company, applied to the Court under s. 173 of the Companies Act 1929 for an order that a contract entered into by the company to sell certain premises should not be void. The contract was made on the day after the presentation of the petition for winding up. In considering the object of s. 173 Vaisey J referred to s. 153 of the Companies Act 1862 and held that the Court had no jurisdiction to make such an order unless a winding-up order had been made.

In a subsequent case, R*e A.1. Levy (Holdings) Ltd.* [1964] 1 Ch 19. Buckley J disagreed with the decision in *Re Miles* case saying, at p. 27, that the object of s. 227 of the Companies Act 1948 (which is similar to s. 173 of the Companies Act 1920):

> is to protect the interests of creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the Court otherwise orders ...

Mr. Gurubachan Singh contended that under s. 223 the payment of the money to Fullmark after the petition was filed was void unless the company applied to the Court for a validating order. He cited a number of cases in support of his contention. I shall now examine these cases.

The first case he cited was *Wiltshire Iron Company* [1868] 3 Ch App 443. In that case Lord Cairns LJ correctly interpreted the meaning of s. 153 of the Companies Act 1862. In his judgment in that case, Lord Cairns said,

> [Section 153] no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding-up, shall, unless the Court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company *in extremis* ...

The present English equivalent of our s. 223, is s. 227 of the English Companies Act 1948. The next case cited by Mr. Gurubachan Singh was *Re Clifton Place Garage Ltd.* [1970] 1 Ch 447. In that case a petitison to wind up the company was presented on 30 November 1966. It was a wholly-owned subsidiary of another company which had granted a debenture for £20,000 on the security of a floating charge. On 24 December 1966, the debenture holders appointed a receiver and manager. The liquidator claimed from the receiver repayment of £4,024.10s 7d. paid by the company into a special account on the ground that it was a disposition of the company's property made after the commencement of the winding-up, which dated back to the presentation of the petition and therefore void under s. 227 of the Companies Act 1948. Harman LJ in his judgment at p. 490, referred to s. 227 and said, "This was undoubtedly a disposition made after the date of the presentation of the petition and is, therefore, a void disposition ..."

Another case cited by Mr. Gurubachan Singh was a decision of the English Court of Appeal. In that case the Court of Appeal decided, *inter alia*, that the payments into the company's account during the period from the date a winding-up petition was presented up to the date a winding up order was made constituted dispositions of the company's property within s. 227 of the Companies Act 1948. See R*e Gray's Inn Construction Co. Ltd.* [1980] 1 All ER 814.

Mr. Gurubachan Singh also referred to an Australian case, *Commonwealth Industrial Gases Ltd. v. Dorcon Constructions Pty. Ltd.* 14 ACLR 201. This case was decided by the Supreme Court of the Northern Territory of Australia. In that case the Supreme Court was considering s. 277 of the Companies Act 1963 (NT) which is identical to our s. 223. In his judgment in that case, Asche CJ referred to Lord Cairns LJ's judgment in *re Wiltshire Iron Co.*, which he said, had been followed in a number of cases in Australia. Asche CJ also quoted a passage from the decision of the Full Court of the Federal Court which decided that s. 227 proceeded upon the footing that a company against which a petition was presented should be deprived of the power to dispose of its assets pending the final hearing of the petition. He adopted a passage from another Australian case, which states, "... that payment of past debt ... will not be validated; in general, it is the very type of transaction which the section is designed to nullify, or void ... .

From the authorities cited above (with the exception of *Re Miles*), it can be concluded that under s. 223 of the Companies Act, the disposition of the property of the company after a winding-up petition has been presented is void unless the Court makes a validating order. The purpose of the section is to protect the interests of creditors when a petition for winding up is presented. The Court, however has the discretion whether or not to make a validating order. The Court cannot exercise its discretion to make a validating order if the result of the order is to make one or more creditors being paid in full. In *re Gray's Inn, supra.*, Buckley LJ in his judgment at p. 718 said,

> Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claim, it is, in my opinion, clear that the Court should not validate any transaction or series of transactions which might result in one or more preliquidation creditors being paid in full at the expense of the other creditors ...

Applying the above principles to the present case, the payment of the RM50,000 by the company to Fullmark as well as the transfer of the piece of property of the company to Fullmark were dispositions of the property of the company to Fullmark after the winding up petition has been presented and such dispositions are contrary to s. 223 of the Companies Act and therefore void. This conclusion is consistent with the view expressed by the Supreme Court in *Lian Keow Sdn. Bhd. & Ors. (In liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 449. In that case Seah SCJ in his judgment at p. 455 made the following observation:

> The learned Judge held (correctly in my view) that the transfers of the first, second and third portions of the estate to the first respondent were void by reason of s. 223 of the Companies Act 1965 but he, however, in the exercise of his discretion, validated them. Learned Counsel for the second appellant had submitted that the learned Judge was wrong to validate these said transfers and that he had exercised his discretion on wrong principles. For the first respondent, learned Counsel now concedes that these three dispositions were made at the time of registration at the Land Registry office and since all three of them were registered after the presentation of the winding-up petition by the Court on 13 November 1978 they were therefore void under s. 223 of the Companies Act 1965.

The two other Supreme Court Judges who sat in the panel agreed with Seah SCJ's observation quoted above. See also *Datin Hajjah Zaleha & Ors. v. Perkasa Trading Sdn. Bhd. & Anor.* [1984] 1 MLJ 372.

The question of validating a transaction is at the discretion of the Court but a person who seeks an order to validate a transaction must make an application for such an order. In the present case there is no such application. In any event even if there is an application, this is not a proper case for the Court to make such an order. If a validating order is made Fullmark would be paid a substantial sum of money at the expense of the other creditors.

For the reasons stated above, I order that the money paid to Fullmark be returned to the company and if any property has been transferred from the company to Fullmark, such transfer is null and void.

Also found at [1990] 2 CLJ 795